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IN THE

SUPREME COURT OF THE UNITED STATES

No. 1014 154

IN THE MATTER OF
JOSEPH E. NAMOFF and JULIUS NAMOFF, etc.
Alleged Bankrupt,

Petitioner,

vs.

HYLAND ELECTRICAL SUPPLY COMPANY, et al.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on March 22, 1960.

OPINIONS BELOW

The memorandum opinion of the Referee in Bankruptcy is unreported. The opinion of the District Court is not reported. The opinion of the Circuit of Appeals is reported in 275 Fed. 2d 14.

JURISDICTION

The opinion of the Seventh Circuit Court of Appeals was filed and entered on February 19, 1960. A petition for re-hearing was filed within the time allotted. The Court of Appeals denied the petition for re-hearing on March 22, 1960. The jurisdiction of this Court is invoked under 28 USC 2101.

QUESTIONS PRESENTED

1. Whether the findings of the Referee in Bankruptcy that no partnership existed as between two individuals can be upset on petition for review by the district judge if there is competent evidence to sustain the finding of the Referee in Bankruptcy.

2. Whether the opinion of the Seventh Circuit Court of Appeals is in conflict with opinions of the Second Circuit Court of Appeals rendered on the extent of the scope of review of the District Court Judge on petition for review and of the Court of Appeals on appeal from the order from the district judge.

3. Whether the opinion of the Seventh Circuit Court of Appeals changes the rule that in order to establish a partnership in bankruptcy a partnership-in-fact must be established by clear and convincing proof and subsidiary to that question whether or not a partnership by estoppel is sufficient to establish a partnership in bankruptcy.

STATUTES INVOLVED

General Order 47, 11 USC Sec. 53.
Burns Annotated Indiana Statutes 50-401 *et seq.*

STATEMENT

An involuntary petition in bankruptcy was filed on March 24, 1956 against the petitioner Julius Namoff who was charged with being a co-partner with one Joseph E. Namoff, trading under the firm names of Chicago Wholesale Distributors and Junior's Country Fair. The petition charges the partnership with committing an act of bankruptcy in that it made a general assignment for the benefit of creditors while insolvent (Petitioner's Appendix 1-3). To this petition the petitioner Julius Namoff filed answer denying the existence of the partnership and made demand for trial by jury. The cause was then referred to the Honorable Russel H. Nehrig, Referee in Bankruptcy, for the United States District Court for the Northern District of Indiana on the question of the existence of a partnership and after hearing evidence on this question the referee concluded that no partnership existed and submitted findings of facts, conclusions of law and judgment denying the existence of the partnership (Petitioner's Appendix 26-28). Thereafter petitioning creditors filed their petition for review (Petitioner's Appendix 25-38). The United States District Court granted the petition for review and vacated the order of the District Court, 275 Fed. 2d 14.

SPECIFICATIONS OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In going beyond the scope of review permitted by General Order 47, 11 USC Sec. 53.

2. In deciding an important state question on the law of partnership which is in conflict with the applicable state law of Indiana.

3. In holding in effect that a partnership by estoppel is sufficient to establish a partnership in bankruptcy.

4. In affirming the order of the District Court.

REASONS FOR GRANTING THE WRIT

This Court should grant the within writ for the reason that the questions involved present serious problems involving the administration of the bankruptcy act in the following particulars:

The decision of the Court below in the instant case and in *In re Duval*, 103 Fed. 2d 653, and *In re Garden City Brewery, Inc.*, CCA 7 208 Fed. 377, upon the authority of which the instant case was decided are directly in conflict with the decision of the Second Circuit Court of Appeals in *Morris Plan Industrial Bank* v. *Henderson*, 131 Fed. 2d 975. In the *Duval* case, the Court of Appeals for the Seventh Circuit enunciated the substantial evidence rule; that is, the district judge may exercise his judgment even though it may be contrary to the finding as made by the referee and when the Court's judgment has been thus exercised, the Appellate Court is not at liberty to disturb the same except where it might conclude there was no substantial evidence or theory which would justify the Court in reaching a conclusion contrary to that of the referee.

This holding is in direct conflict with the holding of the Circuit Court of Appeals in the *Morris Plan* case which holds that the Court of Appeals as well as the District Court is required to accept the Referee's findings of fact unless the same are clearly erroneous and unless there is no evidence in the record to support the findings of the referee.

That there is competent evidence to sustain the findings of the referee is clearly demonstrated by the following excerpts from the record:

Both the district judge and the Circuit Court of Appeals concluded that the referee's finding of fact No. 1 (Petitioner's Appendix p. 26) is clearly erroneous when the referee states that there is no evidence in the record that the goods, wears and merchandise supplied by the petitioner, Julius Namoff, and used by Joseph Namoff were other than sale transactions or capital contributed by Julius Namoff to a partnership business (Petitioner's Appendix p. 90). There is not one shred of evidence in the record to indicate that these transactions were other than what the referee found them to be. There is ample evidence to sustain this particular finding of fact.

> "That he started the business known as Chicago Wholesale Distributors with merchandise that his brother sold him on credit." (Testimony of Joseph E. Namoff, Petitioner's Appendix p. 64, Lines 1 to 3).

> "That he started the business Junior's Country Fair in 1954 . . . that the reason he had the policies listed as Julius and Joseph Namoff, d/b/a Junior's Country Fair, was because he got his start from his brother and he wanted to make his brother feel he would get something for what he owed him." (Testimony of Joseph Namoff, Petitioner's Appendix p. 66, Lines 11 to 17).

The district judge, in his opinion, and adopted by the Court below, states that there is clear evidence in the record that the trucks owned by Julius Namoff were used by Joseph Namoff under arrangements other than a lease. There is not one shred of evidence in the record to sustain that conclusion of the district judge. On the contrary there is ample evidence to sustain the referee's findings that the trucks were used under a lease arrangement.

> "That he received certain checks made payable to himself; that he was paid for truck expenses; that he was leasing a truck to his brother . . . that the reason that Junior's Country Fair would pay him for car expenses would be if something went wrong with the truck." (Testimony of Julius Namoff, Petitioner's Appendix, p. 76, Lines 7 to 12).

Both the District Judge and the Court below concluded that the referee's finding of fact No. 4 was clearly erroneous insofar as the referee stated that the evidence showed the purposes of Julius Namoff in sending signature cards was to secure the indebtedness of Joseph Namoff to Julius Namoff. There is no evidence in the record to sustain the conclusion of the district judge. There is ample evidence to sustain the finding of the referee as to what the intent of the parties was in signing these signature cards.

> "That he, his wife and Julius Namoff signed checks for the merchandise; that the reason Julius Namoff signed checks was because Joseph had borrowed a stock of merchandise from his brother Julius and had promised to pay him for the same; that after a week or so passed he didn't pay him and his brother Julius wanted the stock back; that in order to secure payments from the merchandise he took his brother to the bank and had him sign a card so that only Julius and Joe's wife, Ida, could sign the checks." (Testimony of Joseph Namoff, Petitioner's Appendix p. 65, Lines 3 to 12).

Declarations explaining a business or commercial transaction are admissible as part of the *res gestae, Durham* v. *Shannon* (1888), 116 Ind. 403.

Declarations of the parties made with regard to the matters of business contemporaneous with the acts they tend to explain and qualify are admissible as part of the *res gestae, Allen* v. *Powell,* 56 Ind. App. 601, 115 N.E. 96, 20 Am. Jur. Sec. 679 *et seq.*

Where the referee's findings are based upon conflicting evidence and where there has been oral testimony his findings should not be disturbed.

In re Golden, DCSC, N.Y. (1952), 108 Fed. Supp. 503.

In the Matter of Inmann, DC, Main (1957), 157 Fed. Supp. 506.

Phillips v. *Walker,* CCA 5 (1948), 165 Fed. 2d. 578.

Thus it is clear that there was ample evidence to sustain the findings of the referee.

As further ground for granting the petition the petitioner urges that the opinion of the Court of Appeals evades the rule that in bankruptcy proceedings a partnership in fact must be established by clear and convincing proof.

In the Matter of Ganaposki, 27 Fed. Supp. 41 (1939).

In re Kaplan, 234 Fed. 866 (1916).

In re Hudson Clothing Co., 148 Fed. 205 (aff'd), 153 Fed. 525 (aff'd), 213 U.S. 453 (1906).

Jones v. *Burnham,* 138 Fed. 986 (1905).

In considering whether or not a partnership-in-fact has been established, the Court of Appeals was bound as was the referee and the district judge to follow the substantive law of Indiana as to the elements necessary to constitute a partnership. Indiana has adopted the Uniform Partner-

ship Act, Burns Annotated Statutes 50-401, *et seq.* This statute has been construed by the Supreme Court of the State of Indiana in the case of *Watson* v. *Watson*, 231 Ind. 385, 108 N.E. 2d 893. The *Watson* case holds that there must be, one, a voluntary contract of association for the purpose of sharing the profit and losses as such which may arise from the use of capital, labor or skill in a common enterprise and, two, an intention on the part of the principals to form a partnership for that purpose.

In vacating the judgment of the referee, the district judge emphasized the case of *Moynahan Const. Co.* v. *Mohler*, 75 N.E. 2d 540, 225 Ind. 375 and quoted from that case the following statement:

> "It may be stated that when parties agree to do that which in law constitutes or creates a partnership, it is not material that the parties declare that it shall not be such an association. While the intent of the parties is material, it is the intent to do or to accomplish certain given things as such things are construed in the law."

That case is clearly distinguishable upon its facts. Plaintiff in that case had filed an action for the appointment of a receiver having alleged the existence of a partnership, and the necessity of a receiver to preserve his existing interest in said partnership. The evidence disclosed that the defendant had entered into a contract with the U. S. Public Housing Authority for 1,500 units. That he held conversations with the plaintiff concerning said contract. That the parties signed a memorandum under the terms of which the defendant agreed to pay the plaintiff 25 per cent of the fees to be received. That the plaintiff furnished one quarter of the working capital together with a part of his working organization. That the plaintiff furnished sums totalling $25,000.00 and had been paid $11,000.00 as its

share of $44,000.00 of fees received. That the plaintiff did not make a partnership report to the Gross Income Tax Division of the State of Indiana or a partnership return for Federal income tax purposes. The trial court denied plaintiff's application for the appointment of a receiver and did not specifically pass upon the question of whether a partnership existed. The Supreme Court affirming the trial court held that there was not such evidence that would have compelled the conclusion that a partnership relationship had been brought into being.

Certainly that case, which the district judge relies upon for finding a partnership in the case at bar, has a great deal more substance to it than the present case. The statement that the court cites from the opinion of that case may be true as an abstract statement of the law but the very case itself discloses the necessity that an actual partnership-in-fact must be established. There was far more commingling of funds and community of interest in the *Moynahan* case than in the case at bar.

The holding of the Court of Appeals in effect is that the documentary proof adduced by the petitioning creditors irrespective of any explanations offered by the parties is sufficient to establish a partnership. In short, the holding eliminates the necessity of proving a partnership-in-fact and now states that a partnership by estoppel is sufficient. The effect of this holding is to emasculate General Order 47 and to render the role of the referee completely ineffectual. The factors of credibility of the witnesses and demeanor which the referee had an opportunity to observe are now completely irrelevant. In this connection it is interesting to note the viewpoint adopted by the Court of Appeals in the Second Circuit as to the responsibility of the referee.

"Everyone forms his conclusions from testimony not only from the words which he hears the witnesses utter, but from their appearance when they utter them and the added weight to be attached to a referee's finding or to a judge's if he sees the witnesses depends upon the fact that he has in effect had evidence before him which cold print does not preserve. So far, therefore, as the words themselves leave any latitude the referee's conclusion ought to prevail because we can not appraise the cogency of the lost evidence. In the end, as we have often said, the responsibility for the right conclusion remains the Judge's, as, indeed, it does ours . . . but we have again and again held that except in plain cases he should accept the referee's findings." *Morris Plan Industrial Bank* v. *Henderson*, CCA 2 (1942), 131 Fed. 2d. 975.

SUMMARY OF ARGUMENT.

In summation petitioner's argument is essentially this:

1. That there is a conflict of opinion in the Circuits as to the scope of review of a Referee in Bankruptcy's finding.

2. That the opinion of the Seventh Circuit Court of Appeals insofar as it purports to define what is necessary to constitute a partnership-in-fact constitutes a departure from the applicable local law of the State of Indiana.

3. The opinion of the Seventh Circuit Court of Appeals in effect holds that a partnership-in-fact need not be established in a bankruptcy proceeding but that a partnership by estoppel may be sufficient.

CONCLUSION.

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

GEORGE COHAN and MAX COHEN
Counsel for Petitioner.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

* * (Caption—Bankruptcy No. 4628) * *

Findings of Fact, Conclusions of Law and Judgment of the Referee in Bankruptcy.

The Court having previously heard the evidence and arguments of counsel and having examined briefs filed by counsel upon the issue of the existence or nonexistence of a partnership between the bankrupt, Joseph E. Namoff, and the alleged bankrupt, Julius Namoff, in the operation of the businesses described as Chicago Wholesale Distributors and Junior's Country Fair, pursuant to the order of November 7, 1956, entered by the Honorable Luther M. Swygert, Judge, United States District Court, Northern District of Indiana, directing the undersigned Referee to hear same, and said matter having been taken under advisement, the Court now enters its findings of fact, conclusions of law and judgment as follows:

FINDINGS OF FACT

1. That Julius Namoff supplied goods, wares and merchandise used by Joseph E. Namoff in commencing operation of Chicago Wholesale Distributors and supplied other merchandise during the course of the operation thereof. That there is no evidence in the record that same were other than sale transactions or that they were capital contributions by Julius Namoff to any partnership business.

2. That Julius Namoff paid for a store license for Junior's Country Fair and paid for a utility deposit, but that there is no evidence in the record that same were

intended as contributions to capital of the named businesses.

3. That Joseph E. Namoff on occasions used trucks belonging to Julius Namoff in the operation of said named businesses, but that the only evidence in the record as to same was that said use was under a lease arrangement for which Julius Namoff received no consideration.

4. That Julius Namoff signed signature cards at Calumet National Bank of Hammond and Mercantile National Bank of Hammond, purporting to show himself as a partner in the business of Chicago Wholesale Distributors and Junior's Country Fair and signed large numbers of bank checks in connection with the businesses conducted under the name of Chicago Wholesale Distributors and Junior's Country Fair; that the evidence shows the purpose therefor was to secure the indebtedness of Joseph E. Namoff to Julius Namoff.

5. That there is no evidence in the record that Julius Namoff other than through such control as was represented by being one of the authorized signers of bank checks, exercised any managerial duties or control in the businesses known as Chicago Wholesale Distributors and Junior's Country Fair or that he shared in any profits or losses derived from or incurred in said businesses.

6. There is some evidence that a representative of Dun & Bradstreet was led to believe that Julius Namoff was the sole owner of said named businesses, but there is no evidence that any such information was disseminated to anyone dealing with said named businesses or that anyone relied upon Julius Namoff as being the owner of same.

7. There was direct testimony by representatives of six creditors of Joseph E. Namoff that they did not regard

Julius Namoff as a partner in said named businesses and did not look to Julius Namoff for payment of the debts incurred by Joseph E. Namoff in said named businesses, and there is no evidence in the record that any creditor of said named businesses did regard, or rely upon, Julius Namoff as being a partner in said named businesses.

8. That there is no evidence in the record of any written or oral partnership agreements between Joseph E. Namoff and Julius Namoff.

9. That income tax returns and other tax returns were filed individually and separately by Joseph E. Namoff and Julius Namoff and that there is no evidence in the record of the filing of any tax returns indicating the existence of a partnership between Joseph E. Namoff and Julius Namoff.

10. That the evidence shows that Julius Namoff operated his own separate businesses.

CONCLUSIONS OF LAW

1. That, on the basis of the evidence in the record, a formal partnership was not created in writing or orally by and between the bankrupt, Joseph E. Namoff, and the alleged bankrupt, Julius Namoff, in connection with the named businesses.

2. That on the basis on the evidence in the record, such acts as were taken by either Joseph E. Namoff or Julius Namoff as might have indicated the existence of a partnership were not so taken as to cause or induce creditors of Joseph E. Namoff to regard or rely upon Julius Namoff as being a partner of Joseph E. Namoff in the operation of the said named businesses.

3. That the allegations of the petition of creditors herein as to the existence of a partnership between the bankrupt, Joseph E. Namoff, and the alleged bankrupt, Julius Namoff, are not sustained by the evidence taken herein and that the creditors' petition should be denied upon the issue of the existence of such partnership.

JUDGMENT

It Is Ordered, that the creditors' Second Amended Petition for Adjudication should be, and the same is hereby, denied upon the issue of the existence of the partnership between the bankrupt, Joseph E. Namoff, and the alleged bankrupt Julius Namoff, in the operation of the businesses named in said petition.

Russell H. Nehrig
Referee in Bankruptcy

Entered: November 7, 1957

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

(Caption—Bankruptcy No. 4628)

Opinion on Petition for Review.

(Filed June 18, 1959)

After due consideration, I have concluded that the Referee's Finding of Fact Number 1 is clearly erroneous when he states there is no evidence in the record that the goods, wares and merchandise supplied by Julius Namoff and used by Joseph E. Namoff in commencing operation of Chicago Wholesale Distributors and during the course of its operation were other than sale transactions or capital contributed by Julius Namoff to a partnership business.

I am of the same opinion with regard to his Finding of Fact Number 2 that there is no evidence that when Julius Namoff paid for a store license for Junior's Country Fair and a utility deposit it was intended that these were contributions to a partnership business.

I am of the same opinion with regard to his Finding of Fact Number 3. I believe there is clear evidence in the record that the trucks owned by Julius Namoff were used by Joseph Namoff under arrangements other than a lease. Although a lease was claimed, no lease was produced at the trial. There was no evidence of any payments of rent. Although the titles were in the name of Julius Namoff residing in Illinois, the registrations were in Indiana. The purported reason was to avoid Illinois taxes.

I am impelled to conclude that the Referee's Finding of Fact Number 4 is clearly erroneous insofar as he states that the evidence shows the purpose of Julius Namoff in signing signature cards at Calumet National Bank of Hammond and Mercantile National Bank of Hammond was to secure the indebtedness of Joseph E. Namoff to Julius Namoff. These signature cards in my opinion are strong evidence of a partnership. They expressly state the existence of such an arrangement. When considered with the other evidence relating to the accounts in these two banks, as well as to the entire conduct between Julius and Joseph E. Namoff, these cards indicate clearly that Julius Namoff's purpose in signing them was other than to secure Joseph E. Namoff's indebtedness to him.

It is true that there is no evidence in the record of any written or oral partnership agreements between Joseph E. Namoff and Julius Namoff. However, a partnership may exist in law in the absence of a formal partnership arrangement, written or oral, and even in the face of an express stipulation that the alleged partners do not intend to form partnership. This is settled law. One late enunciation of the principle in Indiana is found in *Moynahan Const. Co.* v. *Mohler*, 75 N.E. 2d 540, 225 Ind. 375. There the court said:

> "It may be stated that when parties agree to do that which in law constitutes or creates a partnership, it is not material that the parties declare that it shall not be such an association. While the intent of the parties is material, it is the intent to do or to accomplish certain given things as such things are construed in the law."

Accordingly, the Referee should have considered the conduct of the alleged partners in deciding whether a partnership existed.

It is my opinion that the evidence when considered as a whole shows conduct that clearly points, if not to a partnership arrangement between Joseph E. Namoff and Julius Namoff, at least, to an intention to do the acts which constituted a partnership.

Besides the transactions and events alluded to in the foregoing paragraphs, there are numerous other facts that compel this conclusion. Among these was the obtaining of a loan by Julius Namoff from Mercantile National Bank of Hammond of $2,051.00, the proceeds of which were deposited to the account of Junior's Country Fair. Another loan from Calumet National Bank of Hammond was evidenced by a note signed by Joseph Namoff and Julius Namoff and his wife. The proceeds of this loan, $6,000.00 were deposited to the account of the Chicago Wholesale Distributors. Four insurance policies were issued in the name of Joseph Namoff and Julius Namoff, doing business as Junior's Country Fair and Chicago Wholesale Distributors. The premiums for these policies were paid by checks signed by Julius Namoff drawn on the accounts of Junior's Country Fair and Chicago Wholesale Distributors. The Chicago Wholesale Distributors obtained and paid for Blue Cross insurance for Julius Namoff without any evidence of the consideration for this purchase.

I think the Referee was clearly erroneous in making his Conclusions of Law Number 1 and Number 3 and in entering the judgment which forms the basis of the petition for review. The judgment entered by the Referee should be vacated and a different judgment entered.

Luther M. Swygert
Judge

June 18, 1959
Lafayette, Indiana

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

(Caption—Bankruptcy No. 4628)

Judgment.

(Filed June 18, 1959)

In accordance with the opinion filed herein today, the judgment entered by the Referee on November 7, 1957 is hereby set aside and vacated.

Further, on the basis of the opinion, it is now ORDERED that the creditors' Second Amended Petition for Adjudication should be, and the same is hereby, granted upon the issue of the existence of a partnership between the bankrupt, Joseph E. Namoff, and the alleged Julius Namoff, in the operation of the business named in said petition.

Enter:

Luther M. Swygert
Judge

June 18, 1959
Lafayette, Indiana

APPENDIX D

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1959, JANUARY SESSION, 1960

No. 12766

In the Matter of JOSEPH E. NAMOFF and JULIUS NAMOFF, ETC., Alleged Bankrupt,

Defendants-Appellants,

v.

HYLAND ELECTRICAL SUPPLY COMPANY, ET AL.,

Plaintiff-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

February 19, 1960

Opinion of the Seventh Circuit Court of Appeals.

Before HASTINGS, *Chief Judge,* KNOCH and MAJOR, *Circuit Judges.*

MAJOR, *Circuit Judge.* Hyland Electrical Supply Company, Chauncey's, Inc., both Illinois corporations with their principal place of business in Chicago, Illinois, and Henry M. Wolf, of Chicago, Illinois, on March 24, 1956, filed in the district court a petition in which it was alleged, among other things, that Joseph E. Namoff and Julius Namoff (sometimes referred to as Julius Namoff, Jr.), both of

Hammond, Indiana, were co-partners, trading under the firm names of Chicago Wholesale Distributors and Junior's Country Fair, and that while insolvent the said partnership and Joseph E. Namoff and Julius Namoff each committed an act of bankruptcy in that they had previously made a general assignment for the benefit of creditors. To this petition Joseph E. Namoff filed his consent to adjudication. Julius Namoff filed an answer denying the existence of the partnership and made demand for trial by jury. Petitioning creditors moved to strike the request for jury trial insofar as it related to the issue of the existence of a partnership.

The district court, on November 7, 1956, entered an order allowing the motion to strike insofar as it pertained to the partnership issue and referred such issue to a referee in bankruptcy. The referee, after a rather extensive hearing, submitted his report which included findings of fact, conclusions of law and judgment denying the existence of the partnership. Thereafter, petitioning creditors filed their petition for review. Julius, the alleged bankrupt, filed his motion to dismiss such petition, which motion was denied by the court.

The court, as shown in a memorandum opinion, decided that the material findings as well as the conclusions of law of the referee as they related to the partnership issue were clearly erroneous. Thereupon, the court, on June 18, 1959, entered its judgment, vacating and setting aside that entered by the referee, and allowed the petition for review on the partnership issue. From this judgment Julius, the alleged bankrupt, appeals.

The contested issues as stated by appellant (Julius) are whether (1) the district judge erred in denying his request for a jury trial; (2) the district judge erred in

overruling his motion to dismiss the petition for review, and (3) the district judge erred in vacating the judgment of the referee which denied the existence of a partnership between the bankrupt, Joseph, and the alleged bankrupt, Julius, in the operation of the businesses named in the petition.

We think this court is without jurisdiction to entertain contested issues 1 and 2. The notice of appeal seeks a review only of the judgment entered June 18, 1959. Contested issue 1 seeks a review of an order partially denying a jury demand, entered November 7, 1956. Contested issue 2 seeks a review of an order denying a motion to dismiss the petition for review, entered November 20, 1958. Thus, the first order was entered some two and one-half years, and the second order some seven months, prior to the entry of the order appealed from. Clearly, both orders were interlocutory, from which the aggrieved party had a right to appeal. Title 11 U.S.C.A. Sec. 47. Time to appeal, however, is limited to a maximum of forty days from the entry of an allegedly erroneous order. Title 11 U.S.C.A. Sec. 48. If only contested issues 1 and 2 were involved, the appeal would be subject to dismissal. *Roberts* v. *Bank of America Nat. Trust & Savings Assn. et al.*, 198 F.2d 919; *In re Butts*, 123 F.2d 250, 251. The fact that an order was subsequently entered from which an appeal was taken is no aid to the right of review of those previously entered. Of the many cases which have so held we cite two of this court. *In re Trust No. 2988 of Foreman Trust & Sav. Bank*, 85 F.2d 942, 943, and *In re Irving-Austin Bldg. Corp.*, 96 F.2d 905, 906.

We hold that contested issues 1 and 2 are not subject to review, and there is no point in discussing them. Even so, we have considered the arguments of the respective parties on these issues and have no doubt but that the court's order as to each was correct.

This brings us to the important issue as to whether the district court erred in entry of the order from which this appeal comes, that is, the order vacating the judgment of the referee on the issue of existence of a partnership. The solution of this issue encompasses the perplexing problem as to our scope of review. A reading of the many cases where the problem has been entertained by courts of various circuits reveals some contrariety of opinion. Appellees seem to believe that the scope of review, as announced by decisions of this court, is broader in this circuit than in some of the others and cite *In re Duvall et al.*, 103 F.2d 653, *In re United States Finance Corp.*, 104 F.2d 593, and *In re Webb* v. *Frisch et al.*, 111 F.2d 887.

There is no doubt but that a district judge is empowered by statute to review the order of a referee. Title 11 U.S.C.A. Sec. 11 provides, "The courts * * of bankruptcy [district courts] are invested * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title [Bankruptcy] * * to * * Consider records, findings, and orders certified to the judges by referees, and confirm, modify, or reverse such findings and orders, or return such records with instructions for further proceedings * *." This broad statutory power bestowed upon a district court is qualified by General Order in Bankruptcy 47, following Section 53, which provides, "* * the report of a referee * * shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous."

We think it would be a waste of time and effort to discuss or even cite the many cases where courts have attempted to elucidate on the right and power of a reviewing court. We are faced with the problem of either affirming or reversing the order of the district court from which

the appeal is taken, which requires a determination as to whether it was erroneously entered. This in turn depends upon whether the district court erred in its findings and conclusion that those made by the referee were "clearly erroneous."

The district court, in connection with its judgment now under review, filed a memorandum opinion in which it discussed the various findings made by the referee in support of his conclusion that no partnership relation existed between Julius and Joseph Namoff. In support of its conclusion to the contrary, the district court in its memorandum expressly found that each of such findings made by the referee was clearly erroneous and stated its reasons therefor. We have made a careful study of the testimony and have no hesitancy in stating that if we were the triers of the facts we would, as the district court did, reach a conclusion different from that of the referee. Even with the serious limitation which General Order 47 places upon the authority of a district court to set aside an order of a referee, we still think the district court reached the correct result.

It must be kept in mind that General Order 47 is directed at the findings of the referee and not at the conclusions drawn therefrom. It is apparent that the referee, erroneously we think, treated the issue of partnership as one of fact. In our judgment, it is a conclusion or at any rate an ultimate fact to be deduced from those which are evidentiary. In *Stewart* v. *Ganey*, 116 F.2d 1010, the issue was whether there had been a concealment of assets by the bankrupt. The court set aside the finding of concealment made by a referee and held that there was no concealment. The court reasoned that the issue of concealment "was an ultimate question of fact" which could be decided by the district court without regard to General Order 47. Thus,

the judgment of the district court, which had vacated the order of the referee, was affirmed. In this connection, we are impressed with the soundness of a statement in *Costello* v. *Fazio*, 256 F.2d 903, 908, "Where a finding of fact by the referee is based upon conflicting evidence, or where the credibility of witnesses is a factor, a district court and, on appeal, a court of appeals will seldom hold such a finding clearly erroneous. The same reluctance is not encountered with regard to a factual conclusion from given facts. In the latter case, the proper conclusion from given facts can be made by the trial judge, or the court of appeals, as well as the referee."

That the referee treated the issue of partnership as one of fact is further emphasized by the admission, over objection, of a line of testimony which permitted lay witnesses to express their opinion on that issue. For example, creditors were permitted, over objection, to state in substance that they dealt with Julius and Joseph Namoff as individuals and not as partners. It is reasonable to think that the reference attached weight to this line of improper evidence, and it is equally reasonable to think that the district court, as it had a right to do, discarded it.

It would unduly burden this opinion to give more than a brief summary of the evidence heard by the referee. It is pertinent to note that much of it was documentary, which the district court was in as good a position as the referee to evaluate. For instance, the two businesses in question each maintained an account in the Mercantile National Bank and later in the Calumet National Bank. These accounts for both businesses were obtained in each bank pursuant to a partnership authority. These authorities were substantially in the same form. That given to the Calumet National Bank reads, "The undersigned desire to establish with you a demand deposit and checking

account to be known as Chicago Wholesale Distributors, and the undersigned hereby certify that the said name is a partnership trade name used in the conduct of an unincorporated business, owned entirely by the undersigned as co-partners." This authority further stated, "We have agreed that checks and orders for the payment of money withdrawing funds from said account may be signed in the name of the partnership by any one (1) of the following named persons: Joseph Namoff, Ida Namoff [wife of Joseph], Julius Namoff." Each of these parties signed the authority as a partner in Chicago Wholesale Distributors. The similar authority given to the Mercantile National Bank provided that only two persons were permitted to draw on said account, namely, Julius Namoff, Jr. and Ida Namoff. In this connection, it is significant that while Joseph claimed to be the sole proprietor of the businesses he was not permitted to draw checks on the account maintained in the Mercantile National Bank. On the other hand, Julius, who denies he was a partner, was one of the two persons authorized to draw on this account. On at least two occasions money was borrowed from the banks on notes signed by Julius, Ida and Joseph, and deposited in the accounts of the businesses. Payments of these bank loans were made by checks on which Julius was a co-signer, on the accounts of the businesses.

During the relevant period there were in force and effect at least four insurance policies covering the named businesses. These policies were purchased and issued in the names of Joseph E. Namoff and Julius Namoff, doing business as Junior's Country Fair and Chicago Wholesale Distributors. Another policy was issued in the name of Julius Namoff, naming Julius as assured, d/b/a Junior's Country Fair, located at 7046 Kennedy Avenue, Hammond, Indiana. At least six other policies listed Julius,

d/b/a Junior's Country Fair. All of these policies were paid for out of the accounts of the alleged partnership business. Julius was insured under a Blue Cross Hospitalization policy purchased and paid for by the businesses. An invoice for merchandise, addressed to Julius, was paid by check signed by Julius and drawn on the account of Chicago Wholesale Distributors. The original deposit required to obtain electrical service for the said businesses was paid by Julius. A store license was purchased by Julius for Junior's Country Fair. Throughout the conduct of these businesses trucks were used which were owned by Julius and registered in his name. Checks for car expense were drawn on these business accounts, payable to Julius. Receipt forms were used which listed a business admittedly owned by Julius individually and one of the businesses in question. Julius carried an Illinois Bell Telephone credit card issued and paid for by the named businesses.

The above is a brief re'sume' of the documentary proof. There was also testimony that Julius had stated that he and his brother were in business together, and that Julius represented to an agent of Dun and Bradstreet that he was the principal owner of Chicago Wholesale Distributors. On the other hand, there was testimony, largely that of Julius and Joseph, which attempted to explain or refute the documentary proof. There was also, as previously discussed, improperly received testimony by witnesses who were permitted to express an opinion upon the partnership issue.

It appears that the referee attached weight to the fact that there was no proof of a formal partnership agreement between Julius and Joseph and to their denial that such a relation existed. In response to this reasoning, the district court stated, and we think properly:

> "It is true that there is no evidence in the record of any written or oral partnership agreements between

Joseph E. Namoff and Julius Namoff. However, a partnership may exist in law in the absence of a formal partnership arrangement, written or oral, and even in the face of an express stipulation that the alleged partners do not intend to form partnership. This is settled law. One late enunciation of the principle in Indiana is found in *Moynahan Const. Co.* v. *Mohler*, 75 N.E. 2d 540, 225 Ind. 375. There the court said:

> 'It may be stated that when parties agree to do that which in law constitutes or creates a partnership, it is not material that the parties declare that it shall not be such an association. While the intent of the parties is material, it is the intent to do or to accomplish certain given things as such things are construed in the law.' "

We think it plain that the acts and conduct of Julius and Joseph relative to the named businesses were such as to make them partners as a matter of law. This is so irrespective of what their intentions might have been in that respect.

The order appealed from is

AFFIRMED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX E.

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11 USC Sec. 53, General Order 47

Order 47. Reports of Referees and Special Masters:

Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept the findings of fact unless clearly erroneous. The judge after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions. Added May 31, 1932; amended Apr. 17, 1933; June 1, 1936; Jan. 16, 1939, eff. Feb. 13, 1939.